IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. _____

JOHN H. MEIER,

Petitioner-Appellee,

vs.

WILLIAM KELLER, ROBERT BORK,

Respondents-Appellants.

JOHN H. MEIER,

Petitioner-Appellant,

vs.

WILLIAM KELLER, ROBERT BORK,
AND JOHN SUCKLING,

Respondents-Appellees.

JOHN H. MEIER,

Petitioner-Appellant,

vs.

DE VOE HEATON, ROBERT BORK,
AND JOHN SUCKLING,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN H. MEIER hereby petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals was filed June 27, 1975 and a petition for rehearing and rehearing and rehearing in banc was denied Oct. 1, 1975. The opinion is reported at 521 F.2d 548.

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals used the wrong criterion in reversing the California District Court's judgment suppressing and enjoining the use of testimony by Meier's former attorney as in violation of the 4th, 5th, 6th, and 14th Amendments of the U.S. Constitution and

ordering return of Meier's records,

(a) since a reviewing court can reverse an injunction only for an ABUSE OF DISCRETION, there having been no finding of an abuse of discretion by the Court of Appeals;

(b) since, when there is jurisdiction of the subject matter and of the person, an injunction cannot be reversed on the ground that the Court had equitable discretion to decline to exercise jurisdiction, it not being a discretionary matter;

(c) since the distinction between law and equity has been abolished under the Federal Rules of Civil Procedure, equitable considerations are immaterial in determining whether a court has jurisdiction;

(d) since Meier had a reasonable expectations of privacy as to his communications and the materials and papers in his attorney's hands which is entitled to protection under the 4th, 5th, 6th, and 14th Amendments.

2. Whether the U.S. District Judge for the District of Nevada improperly failed to recuse or disqualify himself in Meier's complaint to suppress and enjoin the use of testimony by Meier's former attorney in violation of his Constitutional rights and for return of Meier's records, although

the Judge did request the Chief Judge for the Ninth Circuit to assign another judge to hear the criminal cases involving Meier, both the criminal and civil cases having common issues of fact involving the Judge's brother.

3. Whether the Court of Appeals should have considered Meier's claim that he was denied PROCEDURAL DUE PROCESS by the Nevada District Court's dismissal one month after the filing of his civil complaint for suppression of testimony by his former attorney and for return of his records WITHOUT ANY NOTICE, WITHOUT ANY HEARING, AND WITHOUT ANY OPPORTUNITY FOR ARGUMENT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

4th AMENDMENT: Unreasonable searches and seizures -- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

5th AMENDMENT: No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . . .

6th AMENDMENT: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;

to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

14th AMENDMENT: Sec. 1 -- Due Process and equal protections of laws -- . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 U.S.C.

§1331 Federal Question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

§1332 Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between --

(1) citizens of different states; . . .

§1340 Internal revenue; customs duties

The district courts shall have original jurisdction of any civil action arising

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under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§1343 Civil Rights and elective franchise.

The district courts shall have original jurisdiction of any civl action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of

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Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C.
§1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979.)

§1988 Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punich offenses against law, the common law, as modified and changed by the

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constitution and statutes of the States wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Fed. R. Crim. P. 41. Search and seizure

(e) Motion for return of property. -- A person aggrieved by an unlawful search and seizure may move the district court for the district in which the propoerty was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT

This Petition concerns two separate civil actions in 2 different district courts which resulted in one opinion by the Court of Appeals for the Ninth Circuit.

These actions find their genesis in a conference between Meier's counsel and a representative of the Dept. of Justice on Nov. 21, 1973. On that occasion his counsel was told that conspiracy charges against Meier and others were contemplated under 18 U.S.C. §371 in addition to substantive tax charges, and that the indictment might be brought either in Utah, Nevada or California, although IRS had recommended Nevada.[1/] On Nov. 29, 1973 Meier verified the complaint and executed the affidavit in support of his motion for preliminary injunction, wherein he stated that he had learned that his former attorney, John Suckling, was going to testify against him before a Grand Jury. In fact, and unknown to Meier, Suckling had already appeared on Nov. 20, 1973 before a Grand Jury in Nevada pursuant to an ex parte application of an IRS' attorney and an Order of District Judge Foley. Neither Meier

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1/ On Nov. 26, 1973 Meier's counsel wrote the U.S. Attorney in each of the three districts requesting a pre-indictment conference, if the matter was referred there by the Dept. of Justice.

nor his counsel were aware of these proceedings, which were under seal, and Suckling himself did not appear before Judge Foley before testifying before the Grand Jury.

On Dec. 20, 1973 Meier filed a "Complaint for Suppression of Illegally Obtained Evidence and for Injunction and for Return of Property" in the Central District of California against the U.S. Attorney, the Attorney General, and John Suckling. In it Meier asked for an order suppressing evidence obtained in violation of his Constitutional rights and in violation of his confidential attorney-client privilege and for return from the defendants of his papers and documents drafted for his benefit by Suckling and others acting under him. Meier further asked for an injunction restraining Suckling from testifying before, or presenting evidence to, a Grand Jury, and for a temporary restraining order against the U.S. Attorney and the Attorney General from submitting and presenting evidence illegally obtained from Suckling to a Grand Jury.

At the TRO hearing on the following day the Government admitted that Suckling had already so testified in Nevada. The District Court then indicated that he would not make any order interfering with the Nevada proceedings and suggested that Meier pursue his remedies in Nevada.

On the following business day, Dec. 26, 1973 Meier filed in the District Court in Nevada the same complaint asking for the same relief

substituting the U.S. Attorney in Nevada for the U.S. Attorney in California. On Meier's application for a like TRO, Judge Foley refused to hear counsel and denied the application for the TRO.

On Jan, 2, 4, and 9, 1974 the California District Court conducted hearings and a trial at which Suckling testified and evidence was received on Meier's request for a permanent injunction. On Jan. 9, the court entered judgment granting a permanent injunction, suppressing and restraining the use in any District except the District of Nevada of any privileged information obtained from Suckling in violation of Meier's Constitutional rights under the 4th, 5th, 6th, and 14th Amendments in violation of Meier's attorney-client privilege and ordering the return of Meier's property. The Court concluded that it had jurisdiction of the subject matter and over all the defendants not only based on the jurisdictional statement in the complaint (28 U.S.C. §§1331, 1332, 1340, Fed. R. Crim. P. 41(e)), but also for violation of Meier's civil rights under 28 U.S.C. §1343 and 42 U.S.C. §1988.

In the course of the trial it developed that Suckling, a member of the California bar, living and practicing in Los Angeles, had in Sept. 1973 turned Meier's records over to the IRS in Los Angeles, Calif. Within 2 months thereafter, he testified before a Grand Jury in Nevada without any notice to Meier or his counsel pursuant to an order reciting "without claim on behalf of John H. Meier, that such testimony and evidence

would violate the attroney-client privilege." The Grand Jury proceedings were not reported or transcribed, and were not available to the California court.

After the entry of final judgment in Los Angeles on Jan. 9, 1974, Meier again applied to the District Court in Nevada for a TRO based on the res judicata and collateral estoppel effect of the California judgment. The Nevada court again refused to hear counsel and never acted on the application and never denied it.

On Jan. 14, 1974 the Nevada Grand Jury returned 2 indictments in which Meier was named a defendant. One charged a conspiracy under 18 U.S.C. §371 concerning the tax liability of one Jarlson. The other, #LV 74-10, consisted of 3 counts: Count I charges Meier, Robert Kahan, Anthony Hatsis, and James Cowley with a conspiracy to defraud the U.S. under §371, Count II charges Meier with tax evasion for 1969 and Count III charges Meier with tax evasion for 1970. The substantive tax charges are based on the alleged omission of specific items of income, according to the information provided Meier's counsel through discovery procedures in that case. Unrelated thereto, except insofar as it concerns Meier, is an indictment returned against him in Aug. 1973, consisting of 2 counts of alleged tax evasion for 1968 and 1969, based on an expenditures - bank deposit case. Suckling was not a witness in connection therewith.

On Jan. 24, 1974 Meier filed in Nevada a motion for recusation in each of the criminal cases and also in the civil injunction action, based on the Judge's brother being a material witnesss. On Feb. 1, 1974 Meier's counsel received a copy of a Memorandum from District Judge Foley (dated Jan. 25, 1974), in which he stated that on Jan. 24, 1974 he asked Chief Judge Chambers of the Court of Appeals for the Ninth Circuit to "assign a judge to Nevada to handle the Meier cases." On Feb. 8, 1974 Meier's counsel received a copy of Minute Order dated Jan. 21, 1974 by which Judge Foley assigned to the Hon. George H. Boldt, Senior Judge of the Western District of Washington, the criminal actions without any mention of the civil action.2/

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On Feb. 25, 1974 Judge Boldt transferred Count I of #LV 74-10 against Hatsis and Cowley to the District of Utah and Count III against Meier for 1970 to the Central District of California under 18 U.S.C. §3237(b). On Mar. 18, 1974 the U.S. dismissed its case against Kahan and on that day Meier pleaded not guilty to Counts I and II. On Apr. 1, 1974 Meier was arraigned in Los Angeles on Count III. On Jun. 20, 1974 the District Court in Utah dismissed Count I, the conspiracy count, on motion of Cowley, after severing and recusing himself from the case against Hatsis, on the grounds that the count

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On Feb. 4, 1974 Meier's counsel received a copy of a Nevada minute order dated Jan. 30,

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was fatally insufficient as a matter of law under the Federal Rules of Criminal Procedure and the U.S. Constitution. The U.S. did not appeal therefrom. On Aug. 2, 1974 Judge Boldt, although apprised that the Government had not appealed such ruling, ruled that the identical count was sufficient as a matter of law despite the applicability of res judicata under Blonder-Tongue Labs v. Univ. of Ill. Found., 402 U.S. 313, 328 (1971).

As a protective measure Meier on May 17, 1974 to meet the Court's deadline for the filing of motions, filed a motion to suppress and for return of his property on the same grounds as the injunction action which had culminated in final judgment granting the permanent injunction. On Aug. 2, 1974 Judge Boldt also denied this motion on the ground that the California Court's ruling on the violation of Meier's Constitutional rights and of the attorney-client privilege was not binding as a matter of res judicata or collateral estoppel. Meier's Petition for Writ of Mandamus was denied. On Oct. 17, 1974 Meier filed a Petition for Writ of Certiorari in this Court.

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1974 by which the civil injunction action was dismissed on the "authority of Rogers (sic) v. United States, 158 F.Supp. 70." The only papers or pleading filed by the Government defendants was on Jan. 23, 1974, an "Answer and Motion to Dismiss." No points or authorities were filed therewith. Without any hearing or notice to Meier and prior to the time allowed for response or opposition by Local Rule 16(c) of the Rules of Practice for the District of Nevada, the court on Feb. 1, 1974 entered its minute order of Jan. 30, 1974 dismissing the action as against all defendants. Meier's Petition for Writ of

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In the meantime the Nevada LV 74-10 case was set for trial on Dec. 2, 1974. Meier was in England and was advised by his physician that he should not for medical reasons travel to attend the trial or risk deafness. When he failed to appear, the trial judge ordered his bail forfeited and issued a warrant for his arrest with $500,000 bail. When he thereafter failed to attend a status hearing in the Central District of California, he was declared a fugitive and another warrant for his arrest issued with another $500,000 bail. As a result this Court denied the Petition on the basis of "Molinaro v. New Jersey, 396 U.S. 365," 419 U.S. 1116.

The other two indictments were held in abeyance and no action has been taken with respect to them.

Mandamus to the Court of Appeals for the Ninth Circuit in connection therewith was denied Mar. 19, 1974.

The U.S. Attorney and the Attorney General appealed from the Judgment of the Central District of California but did not timely perfect their appeal by the timely filing of the proper certificate signed by the U.S. Attorney, as required by 18 U.S.C. §3731. Meier cross-appealed on the grounds that the court should not have excluded the District of Nevada from the ambit of its injunction, since the order ordering Suckling to testify entered in the ex parte proceedings in Las Vegas on the application of an IRS' attorney was not binding on Meier and did not constitute any basis for excluding Nevada from the judgment. Suckling did not appeal.

Meier appealed also from the dismissal of the Nevada action, for lack of procedural due process.

Although the Government defendants urged Molinaro as a basis for the Court of Appeals' dismissing Meier's appeals, the Court felt that, since Suckling, in addition to Government defendants, was a party and since the proceedings were instituted before the Jan. 1974 indictment, the appeal was sufficiently distinguishable from Molinaro and denied the motion to dismiss Meier's appeals.

Meier's alternative ground for his motion to dismiss the U.S. Attorney's and Attorney

General's appeal, if the action be deemed criminal rather than civil, as not complying with 18 USC §3731 insofar as the timely filing of an appropriate certificate, was denied.

With respect to the Government defendants' appeal, although they never questioned the jurisdiction of the Central District of California, the Court of Appeals proceeded to examine this issue. To buttress its conclusion that "equitable considerations required that Court to dismiss Meier's action" (521 F.2d at 554), the Court of Appeals proceeded to find facts with no basis in the record on matters not urged below, and then concluded that the trial court had discretion to withhold relief from Meier and should not have entered judgment in his favor, but should have declined to exercise its own jurisdiction and dismissed as to all despite the fact that Suckling had not appealed.

With respect to Meier's appeal from the dismissal of the Nevada action, the Court of Appeals did not consider Meier's denial of procedural due process, but rather dismissed the appeal for want of appellate jurisdiction, on the tenuous ground that, although Meier sought the return of his property and the action was not tied by Meier to a criminal prosecution in esse since Suckling had already testified before the Grand Jury, there was a criminal prosecution in esse.

REASONS FOR GRANTING THE WRIT

I

THIS COURT HAS NEVER EXPRESSLY CONSIDERED THE JURISDICTIONAL BASIS FOR A SUPPRESSION ACTION FOR RETURN OF PROPERTY PRIOR TO INDICTMENT DESPITE THE CONFLICTING VIEWS OF THE COURTS OF APPEALS.

The bulk of the decisions which have skirted the issue have generally been concerned with whether there is federal appellate jurisdiction and a final, appealable order. DiBella v. U.S., 369 U.S. 121, 122-3; Carroll v. U.S., 354 U.S. 394; Cogen v. U.S., 278 U.S. 221. Such an issue is involved only in the Nevada case, discussed infra, not in the California proceedings. In Rea v. U.S., 350 U.S. 214, an action to enjoin federal narcotics officers from testifying in a state prosecution with respect to evidence resulting from an illegal search, this Court relied merely on the federal Rules as a basis for enjoining the federal agents, pursuant to its supervisory powers over federal law enforcement agencies, to enforce obedience to those federal Rules. In reaching this conclusion, the Court observed that no constitutional question was raised, 350 U.S. at 217.

The characterization of this jurisdictional fount as "anomalous jurisdiction" by Judge Wyzanski in Lord v. Kelley, 223 F.Supp. 684, 688-9 (D.Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir.), cert.denied, 379 U.S. 961, has led District Courts and Courts of Appeal to varying results on the grounds such jurisdiction is equitable and should be exercised with restraint. See, Richey v. Smith, 515 F.2d 1239, 1245 (5th Cir. 1975); Centracchio v. Garrity, 198 F.2d 382 (1st Cir. 1952) cert.denied, 344 U.S. 866; Smith v. Katzenbach, 351 F.2d 810, 815-6 (D.C. Cir. 1965); Hunsacker v. Phinney, 497 F.2d 29, 32-5 (5th Cir. 1974), cert. denied, 420 U.S. 927. The most recent opinion, which summarizes the authorities in this case, is that in Richey, supra, 515 F.2d at 1243, which concludes that "such actions are governed by equitable principles whether viewed as based on F.R. Crim. P. 41(e) or on the general equitable jurisdiction of the federal courts. Id. at 34. Whether to exercise that jurisdiction in a given case is subject to the sound discretion of the district court."

The Court of Appeals below cited the bulk of these authorities and based on its findings of fact, which are in large part conjectures and not based on any evidence whatsoever in the record, 3/

3/

The Court of Appeals is incorrect in finding that the instant case is "important only in relation to the pending criminal prosecutions."

(continued on p. 20)

concluded that the California court should have refrained from exercising its own jurisdiction, 521 F.2d at 556. None of the cases cited in the opinion below concerns a case in which the trial court accepted jurisdiction to grant an injunction which was reversed on appeal. This

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521 F.2d at 552. There is presently pending, and since 1972 has been pending, a suit by Hughes Tool Co. against Suckling, Meier, et al. in the U.S. Dist. of Utah, #C71-72, in which the very issue here under consideration is raised as to the propriety of Suckling's testifying against his former client. That matter concerns the identical mining claims mentioned by Suckling in his affidavit filed in the ex parte grand jury proceedings Nov. 20, 1973, of which Meier had no notice. In that action Hughes has not contended that the mining claims are valueless, as Suckling intimates (in fact, gold is now being mined in some of them). The value of the mining properties is not there in issue. The issue is whether the sellers of the properties to Hughes shared any part of the sales proceeds with employees of Hughes Tool in breach of any alleged fiduciary duty. There is no issue as to fraud and the word "fraud" is not mentioned in that complaint attached to Suckling's affidavit filed in the Nevada ex parte proceedings.

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Court should note that the opinion does not conclude that it was an abuse of discretion for the Central District of California to have accepted and exercised its jurisdiction. The Court ignored its own rulings, U.S. v. Springer, 478 F.2d 43, 45 (9th Cir. 1972), reh. denied,

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The Court of Appeals is incorrect in concluding, at the urging of the government's brief, that the California civil action hampered a criminal action in Nevada. The Court will note that the trial judge carefully refrained from interfering with the Nevada proceedings by specifically excluding the District of Nevada from the scope of his injunction. The California judgment has, and has had, no effect on the Nevada criminal proceedings.

The Court of Appeals is incorrect in concluding that Meier had "no sound reason to suspect" that indictments would be returned other than in Nevada, without saying why. Id. at 554. His counsel had no reason not to rely on the representation on Nov. 21, 1973 of Mr. Cotton of the Dept. of Justice as to possible for a for the later conspiracy charges. On Nov. 29, 1973 the complaint was verified by Meier and the affidavit supporting an application for preliminary injunction executed. The only reason for a delay in the filing thereof was the continual doubt expressed by both the U.S. Attorney in Nevada and Mr. Cotton as to where the prosecutive file would be forwarded.

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that the grant of an injunction will not be reversed absent an abuse of discretion. The mere fact that the appellate court would in its discretion have acted otherwise is not sufficient to constitute an abuse. Gibbs v. Buck, 307 U.S. 66, 77; U.S. v. Corrick, 298 U.S. 435, 437-8; 7 Moore's Federal Practice, Paragraphs 65.04 [2], 65.21.

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The suggestion that Meier indulged in forum shopping borders on the absurd, since the Central District of California has 18 judges, and cases are assigned on filing by random selection.

The fact that Meier filed his 1970 income tax return while in the Central District of California and the fact that Count III of LV 74-10 indictment was transferred to that district is evidence that this matter is patently distinguishable from Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965), since the seizure of Meier's papers did take place in Los Angeles, as developed during the trial.

At the time judgment was entered on Jan. 9, 1974, there was only one prosecution in Nevada, which has nothing to do with Suckling's testimony. Thus, the Court of Appeals' conclusion that Meier should have filed a preindictment motion in Nevada because the "Nevada district court was already familiar with the case, had jurisdiction over

(continued on p. 23)

However, it is submitted that the court below had jurisdiction based on the statutory grant allged in the complaint and for violation of Meier's constitutional and civil rights, as found by the District Judge, under 28 U.S.C. §1343 and the provisions of Title 42, U.S.C. §§1983, 1988. See Wright v.

3/ (continued from previous page)

both prosecutions (sic) and had already ruled, albeit ex parte, on the claims Meier was pressing. Unlike the California district court, it has ready access to a transcript of the allegedly privileged testimony." (Id. at 555), is erroneous in several respects. The Government has represented to Meier that the grand jury proceedings were not recorded or transcribed. The Nevada court had no more before it than the papers filed, which were made available to the California trial judge, as Court's Ex. 1 under seal. Accordingly, the Nevada court was in no better position than the California court. Neither had access to the grand jury testimony.

In any event, Meier did do what the Court of Appeals suggests and did file a complaint for suppression of testimony and return of his papers on Dec. 26, 1973 in Nevada, to no avail. Ibid. Without once being afforded the opportunity to appear before the Court for argument, Meier's complaint was dismissed, as hereinafter discussed. The Court of Appeals does not note that its decision

(continued on page 24)

Florida, 495 F.2d 1086 (5th Cir. 1974). It is this contention which makes review by this Court imperative for the reason that assuming the correctness thereof, then the scope of the trial court's discretion, if any, must be determined by this Court's recent decision in Hagans v. Lavine, 415 U.S. 528.

Prior to this decision the criterion was often posed as to whether there was a substantial question to support federal jurisdiction or whether the claims were so attenuated or unsubstantial as to be absolutely devoid of merit. This Court concluded that constitutional claims would be insubstantial only if prior decisions rendered them frivolous. It rejected a criterion which turned on whether they were of doubtful or questionable merit, citing Goosby v. Osser, 409 U.S. 512, 518. 415 U.S. at 537-8.

"Jurisdiction is essentially the authority conferred by Congress to

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3/ (continued from previous page)
leaves Meier without any preindictment remedy, either in California or Nevada.

Since the permanent injunction excluded the District of Nevada from its scope, the Court of Appeals' conclusion that it interfered with 2 prosecutions or that it controlled a criminal prosecution in another district, is fallacious and just plain wrong. Ibid.

decide a given type of case one way or the other. The Fair v. Kohler Die Co., 228 U.S. 22, 25 (1913). Here, §§1343(3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation under color of state law, or constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter for threshold determination, turned on whether the question was too insubstantial for consideration.

* * * * *

"Judged by this standard, we cannot say that the equal protection issue tendered by the complaint was either frivolous or so insubstantial as to be beyond the jurisdiction of the District Court. We are unaware of any cases in this Court specifically dealing with this or any similar regulation and settling the matter one way or the other." 415 U.S. at 538-9.

Since the trial court found that Moore's Constitutional rights had been violated, there is no doubt that the complaint and action filed in the Central District of California satisfied this criterion. The discretionary yardstick used by the Court of Appeals and other courts relying on "anomalous jurisdiction" does not withstand analysis in light of this Court's ruling in Hagans.

Since the trial court had jurisdiction over the U.S. Attorney and Attorney General, since John Suckling was subject to the jurisdiction of the court, was a member of that bar, and was privy to the Internal Revenue seizure of Meier's papers in Los Angeles, and since the cause of action was not frivolous, Hagans v. Lavine leaves no discretion for the court's exercise of jurisdiction, even under F.R. Crim. P. 41(e).

II

THE COURTS OF APPEALS CONTINUE TO IGNORE THE FACT THAT THE FEDERAL RULES OF CIVIL PROCEDURE IN 1938 ELIMINATED THE DISTINCTION BETWEEN LAW AND EQUITY.

The Court of Appeals below relied on numerous decisions whose results turn on equitable considerations, 521 F.2d at 554, et seq., such as irreparable injury or inadequate remedy at law. As succinctly stated in Moore's Federal Practice:

> "A long line of cases has recognized and applied the simple but important principle . . . that Rule 2 has effected a procedural union of law and equity: there is no longer a law side or an equity side of the court; it is no longer a defense that plaintiff has an adequate

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remedy at law or that the suit should be in equity; the main distinction is between jury and non-jury cases." 2 Moore's Federal Practice, par. 2.02, 306 [underlining added].

". . . a complaint which states a cause of action is not to be dismissed because the claim alleged in 'legal' while the relief prayed is 'equitable,' or vice versa." Id. at par. 2.10, 457.

Since this matter does not concern any issue as to a jury trial, it is submitted that the Court of Appeals improperly relied on equitable considerations in reaching its decision to reverse the permanent injunction. The Federal Rules of Civil Procedure have apparently been ignored by many courts which still adhere to common law concepts and criteria, which this court should now correct.

III

THE COURT OF APPEALS HAD APPELLATE JURISDICTION TO DETERMINE THAT MEIER WAS DENIED PROCEDURAL DUE PROCESS BY THE DISMISSAL OF HIS NEVADA COMPLAINT FOR SUPPRESSION OF TESTIMONY AND FOR RETURN OF HIS RECORDS ONE MONTH AFTER FILING WITHOUT ANY NOTICE, WITHOUT ANY HEARING, AND WITHOUT ANY OPPORTUNITY FOR ARGUMENT.

The Court of Appeals below felt it unnecessary to decide whether it had jurisdiction to consider Meier's cross-appeal from the California judgment. 521 F.2d at 553. It is submitted that there was appellate jurisdiction for the following reasons: the complaint was filed before the indictment in question was returned, at the time of filing on Dec. 20, 1973, Meier had no knowledge that any grand jury proceedings had been initiated, the matter was tried and proceeded to judgment granting a permanent injunction prior to the indictment, and the final judgment ordered return to Meier of his papers and records. Preceding the filing of the action, an in-hand demand for return of Meier's records was served on Suckling on Nov. 26, 1963, to which he did not respond. On Nov. 29, 1973 the complaint herein was verified by Meier. It is therefore

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apparent that the action meets the the criteria of Carroll v. U.S., 354 U.S. 394, cited with approval in DiBella, supra, 369 U.S. at 131-2, and was essentially for return of property.

> ". . . under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur, or after dismissal of the case, or perhaps where the emphasis is on the return of property rather than its suppression as evidence. In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. Burdeau v. McDowell, 256 U.S. 465." 354 U.S. at 403-3.

Since the motion in Carroll was made after indictment, the Government's appeal from the suppression order in the criminal case was considered interlocutory, despite the fact that the Government argued that it might as a result have to dismiss the indictment. This Court in reliance on Carroll and Cogen v. U.S., 278 U.S. 221, enunciated a criterion in DiBella, supra, on which the Court of Appeals here premised its lack of jurisdiction re appeal from the dismissal of the Nevada case, since suppression was also requested:

"Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent. Ibid; see Carroll v. U.S., 354 U.S. 394, 404 note 17; Re Brenner (NY) 6 F.2d 425 (CA2d Cir. 1925)." 369 U.S. at 131-2.

A reading of footnote 17 in the Carroll opinion shows that this Court did not intend to "suggest that a motion made under Rule 41(e) gains or loses appealability simply upon whether it asks return or suppression or both." 354 U.S. at 404. Justice Brandeis' opinion in Cogen compels the conclusion that whether the proceedings are plenary or independent allowing for appealability, must be determined by the substance of the application.

"Where the proceeding is a plenary one, like the bill in equity in Dowling v. Collins (C.C.A. 6th) 10 F.(2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. Application for return of papers, or other property may, however, often be made by motion or other summary proceeding, by reason of the fact

that the person in possession is an officer of the court. (citations) Where an application is filed in that form, its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of a criminal case. The independent character of the summary proceedings is clear, even where the motion is filed in a criminal case, whenever the application for the papers is made by a stranger to the litigation (citations), or wherever the motion is filed before there is any indictment or information against the movent, like the motions in Perlman v. United States, 247 U.S. 7, and Burdeau v. McDowell, 256 U.S. 465; or wherever the criminal proceedings contemplated or pending is in another court, like the motion in Dier v. Banton, 262 U.S. 147. . . And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movent is pending in the same court." 278 U.S. at 225-6.

Under these parameters, there can be no doubt that the Court of Appeals had appellate jurisdiction in connection with the California case.

See Goodman v. U.S., 369 F.2d 166 (9th Cir. 1966); Van der Ahe v. Rowland, ___ F.2d ___, 35 AFTR 2d 75-367-370 (9th Cir. 1975). It held that it did with respect to the Government attorneys' appeal under "28 USC §1291 or §1292(a)(1)." 521 F.2d at 552. Accordingly, if the judgment was not interlocutory as to one party, it cannot be as to the other. See Gillespie v. U.S. Steel, 379 U.S. 148, 152.

It follows that it similarly had appellate jurisdiction with respect to the Rowell case, since an identical issue there obtained for suppression and return of Meier's papers. Other panels in the Ninth Circuit have so held. Van der Ahe v. Rowland, supra.

A careful reading of both complaints will show that there is no reference therein or in any of the supporting papers to the Aug. 1972 bank deposit case. There is no reference whatsoever to that indictment for the reason that the civil actions bear no relationship whatsoever to it. That indictment is bottomed on a bank-deposit-expenditures case for 1969 and 1969. Suckling has nothing to do with that case and only testified before the Grand Jury long after that indictment was returned.

The substantive counts of #L-V 75-12, the January, 1975 indictment, are premised on the alleged omission of specific items of income, based on the conspiracy allegedly entered into between Suckling, Meier, and others. There are very few, if any, overlapping facts in

support of the two indictment. Suckling did not testify before any grand jury with respect to the Aug. 1973 case and would be only peripherally connected therewith, if at all. On the other hand, he is not only a material, but necessary, witness to the Government's Jan. 1974 indictment, which was returned only after final judgment had been entered in California. On one occasion the Government admitted that it might not proceed to trial in #74-10 without Suckling's testimony.

It is clear that as a matter of law, the Nevada court was bound by the California judgment based on res judicata, since the parties were in substance identical or in privity with each other. Drummond v. U.S., 324 U.S. 316, 318. See, McRae v. U.S., 420 F.2d 1283 (D.C. Cir. 1969). Before Meier could move for judgment on the pleadings, the district court dismissed the action as to all defendants without any notice, without any hearing, and without any points and authorities having been filed by the Government. There was just as much subject matter jurisdiction in Nevada, as there was in California. Such jurisdiction must be tested at the time of the filing of the complaint. At that time there was no indictment returned. The later return of the indictment could not deprive the court of jurisdiction and did not moot the appeal. Hoffritz v. U.S., 240 F.2d 109, 111 (9th Cir. 1956).

Under a correct reading of Carroll and DiBella and the other decisions of this Court

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of Appeals, the Court had appellate jurisdiction to determine that Meier was deprived of procedural due process under California Diversified Promotions, Inc. v. Musick, 505 F.2d 278 (9th Cir. 1974).

> "It has long been held that a judge can dismiss sua sponte for lack of jurisdiction. The power is not absolute, however, and '[a]ll of the circumstances must be considered' in determining whether the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing renders the dismissal void, Beshear v. Weinzapfel, 474 F.2d 127, 133 (7th Cir. 1973). The Supreme Court has noted that 'The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' Anderson National Bank v. Luckett, 321 U.S. 233, 246 (1944)
>
> "This court has held that, when jurisdiction is present, it is error to dismiss a claim on the merits without notice, a hearing, and an opportunity to respond, unless the complaint could not be corrected by amendment. Worley v. Cal. Dept. of Corrections, 432 F.2d 769

(9th Cir. 1970). In reversing the sua sponte dismissal of a complaint under 42 USC §1983, we held in Harmon v. Sup. Ct., 307 F.2d 796, 798 (9th Cir. 1962):

> 'The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right. Appellant is entitled to have process issued and served and to be heard.'
>
> "See also Clinton v. LA County, 434 F2d 1038 (9th Cir. 1970) Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970). A similar rule has been followed by this court in cases involving pro se complaints by prisoners." 505 F.2d at 280-1.

There was a like denial of due process by the dismissal of the Nevada Court. This dismissal rendered moot the suggested remedy of the Court of Appeals regarding the filing of preindictment action in Nevada. 521 F.2d at 555. Although Meier took every precaution, short of filing a comparable action in Utah since that was a potential forum according to the representative of the Dept. of Justice, to obtain judicial relief from the violation of his Constitutional rights by Suckling and the

Government attorneys and for return of his papers from both, the Court of Appeals in effect concluded that he is relegated to the filing of a motion only after indictment in the criminal proceedings.[4/] There is no valid authority to support such a conclusion, in light of the many decisions of this Court sanctioning the two actions filed by Meier.

IV

MEIER HAD A REASONABLE EXPECTATION OF PRIVACY AS TO THE ATTORNEY-CLIENT RELATIONSHIP WITH SUCKLING AND AS TO THE MATERIALS AND PAPERS IN HIS ATTORNEY'S HANDS, WHICH IS ENTITLED TO PROTECTION UNDER THE 4th, 5th, 6th and 14th AMENDMENTS.

Suckling's relationship to Meier finds its genesis in Las Vegas in 1969 at a time when Meier was living and working there as a consultant to Howard Hughes. Suckling travelled to

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4/ Although Meier filed a Petition for Writ of Mandamus in the Court of Appeals for the Ninth Circuit, #74-1312, on account of the Nevada dismissal, it was denied prior to the filing of the notice of appeal from the dismissal.

Las Vegas from Los Angeles, where he practiced law, and was introduced to Meier as a tax expert and estate planner. Suckling's own affidavit, on which Judge Foley's ex parte Order requiring him to testify before the Grand Jury was based, spells out his allegation that Meier asked him if he "knew of a way in which he could avoid income taxes on a substantial amount of profits which might be coming to him out of certain mining transactions which were then being planned." It was Suckling and other tax experts, both attorney and CPA, who without consulting Meier about the mechanics, concocted their plan. Apparently to save his own skin regarding this plan which Suckling now says consti tuted tax evasion Suckling was disposed to violate the Canons of Professional Ethics and ABA Code of Professional Responsibility,[5/] and the attorney client relationship. See U.S. v. Kasmir, #74-611, under submission in this Court.

There is no doubt that Meier could reasonably rely on highly recommended tax counsel for advice, and if the advice was improper or incompetent, resulting in tax charges against him, a waiver of the attorney-client privilege should not follow, as Judge Foley seemed to feel

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5/ The ABA's most recent opinion very pertinent hereto is Formal Opinion 341, 61 ABAJ 1543 (Dec. 1975).

and as the Court of Appeals intimates.6/ Reliance on competent tax advice is well-nigh an absolute defense to any such charges. See U.S. v. Shewfelt, 455 F.2d 836, 839 (9th Cir. 1972) cert. denied 406 U.S. 944; U.S. v. Phillips, 217 F.2d 435 (9th Cir. 1954). Apparently this is the reason that the U.S. would not prosecute without Suckling's testimony.

V

THE NEVADA DISTRICT JUDGE IMPROPERLY FAILED TO RECUSE HIMSELF.

Although Judge Foley recused himself from the Meier criminal cases, he did not rule on Meier's motion for recusation filed in the civil injunction action on Jan. 24, 1974. Under the Canons of Judicial Ethics adopted by the American Bar Association, §4(c)(1)(d)(iv) to

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6/ Meier is in no sense bound by the ruling of Judge Foley in granting the ex parte Order requiring Suckling to testify before the Grand Jury. Due process prohibits estopping a litigant who never appeared in a prior action from litigating an issue. Blonder-Tongue Labs v. Univ. of Ill. Foundation, 402 U.S. 313, 329.

avoid any appearance of partiality, since his brother was going to be a material witness, he should have recused himself rather than dismiss the action.

If the Canons have any meaning at all, this was a proper case for their application. See Cinderella v. Smith, 510 F.2d 516 (6th Cir. 1975); cf. Gladstone v. McLaughlin, 510 F.2d 765 (9th Cir. 1975); Prince Inc. v. Lord, 508 F.2d 552 (6th Cir. 1972), cert. denied, 95 S.Ct. 2011.

Since Judge Foley assigned the criminal cases to a judge from another district in light of his brother's being a material witness, it follows a fortiori that he should have consistently recused himself from the related case.

CONCLUSION

For the foregoing reasons, John E. Wayne respectfully requests that the petition for writ of certiorari be granted and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

ROBERT E. WAYNE
LELAND W. WAYNE

Attorneys for Petitioner

Okl., 429 F.2d 1253, 1260 (10th Cir. 1970). A transfer policy, whereby any student may transfer as of right from a school where his race is in the majority to a school where his race is in the minority, see note 15, *supra*, may be included in the plan, with the provision that the school district shall provide the necessary transportation costs.

It shall be the responsibility of the District Court to assure that "future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system." *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 21, 91 S.Ct. at 1279. Accordingly, any construction of new schools or additions to old schools other than that contemplated in the plan, shall be submitted to the District Court for approval. *See Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* 351 F.Supp. at 811.

The District Court shall retain jurisdiction to assure that the plan is one which effectively integrates the entire Omaha school system, and to assure that the plan is in fact being carried out. To assist the court in its monitoring function, the court's order should include reporting provisions, requiring that reports on the operation of the plan be filed periodically with the court for a period of at least three years. *See Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142, 153 n.10 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041 (1973); *Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* 351 F.Supp. at 811.

It is necessary that school officials should come forward promptly with an acceptable plan for the district court's consideration. The district court is required to remedy the discrimination under an acceptable plan in accordance with the guidelines set forth in this opinion.

Reversed and remanded for further proceedings consistent with this opinion. The mandate of this Court shall issue forthwith.

Costs shall be taxed against the School District of Omaha.

John H. MEIER, Plaintiff-Appellee,

v.

William KELLER and Robert Bork, Defendants-Appellants.

John H. MEIER, Plaintiff-Appellant,

v.

William KELLER et al., Defendants-Appellees.

John H. MEIER, Plaintiff-Appellant,

v.

DeVoe HEATON et al., Defendants-Appellees.

Nos. 74-1182, 74-1673, 74-1910.

United States Court of Appeals, Ninth Circuit.

June 27, 1975.

As Modified on Denial of Rehearing and Rehearing En Banc Oct. 1, 1975.

A person under indictment for tax evasion appealed from an order of the United States District Court for the District of Nevada, Roger D. Foley, J., from an order dismissing an action in which he sought an injunction prohibiting his attorney from appearing before any grand jury and suppressing all leads and evidence derived from his attorney's cooperation; he also appealed from an order of the United States District Court for the Central District of California, A. Andrew Hauk, J., which, although it awarded similar relief for that district, excluded the District of Nevada from its effect. The Court of Appeals, Duniway, Circuit Judge, held, inter alia, that the

California District Court should have declined jurisdiction and that the order of the Nevada District Court was not appealable.

Appeals dismissed.

1. Courts ⇐405(1)

Court of Appeals had jurisdiction over appeal by government attorneys from district court's decree enjoining them from conducting any investigation or initiating any criminal proceeding in which there would be used any evidence containing privileged confidential communications between person under indictment for tax evasion and his attorney where complaint seeking such relief was, in substance, one against the government, not against government attorneys in their individual capacities. 18 U.S.C.A. § 3731; 28 U.S.C.A. §§ 1291, 1292(a)(1); Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

2. Criminal Law ⇐1078

While delay in filing certificate that appeal by United States from decision suppressing or excluding evidence or requiring return of seized property is not taken for purpose of delay and that evidence is substantial proof of fact material in proceeding is not to be regarded with favor, such delay does not destroy appellate jurisdiction. 18 U.S.C.A. § 3731; Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

3. Courts ⇐262

"Anomalous" jurisdiction of district court is equitable in nature and should not automatically be exercised whenever it exists; rather, it is to be exercised, if at all, with caution and restraint and in accordance with familiar limitations on granting of equitable relief. Fed.Rules Crim.Proc. rule 41, 18 U.S.C.A.

4. Courts ⇐260.4

Where, at time action was filed in United States District Court for Southern District of California to prevent attorney from giving grand jury testimony and cooperating with federal investigation of possible tax evasion and conspiracy charges, attorney had already given testimony to grand jury in proceedings in Nevada and there was no sound reason to suspect that superseding indictments, or any indictments, would be returned in California or elsewhere, district court in California should have declined jurisdiction. U.S.C.A.Const. Amends. 4, 5, 6, 14; Fed.Rules Crim. Proc. rules 41, 41(e, f), 18 U.S.C.A.; 18 U.S.C.A. § 3731; 28 U.S.C.A. §§ 1291, 1292(a)(1).

5. Criminal Law ⇐1023(3)

Denial of preindictment motion or comparable relief is interlocutory, nonappealable order unless motion is solely for return of property and is in no way tied to criminal prosecution in esse against movant. 18 U.S.C.A. § 3731; Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

6. Courts ⇐405(3.5)

District court's action in dismissing complaint by person under indictment for tax evasion, which prayed preliminary and permanent injunction against indictee's attorney prohibiting him from appearing before any grand jury, suppressing all leads and evidence derived from his cooperation and compelling immediate return to indictee of all documents belonging to him, was nonappealable. Fed.Rules Crim.Proc. rule 41(e, f), 18 U.S.C.A.

Charles Brookhart, Atty. (argued), Tax Div., Dept. of Justice, Washington, D. C., for defendants-appellants.

Robert H. Wyshak (argued), Los Angeles, Cal., for John H. Meier.

OPINION

Before DUNIWAY and HUFSTEDLER, Circuit Judges, and CONTI,* District Judge.

*The Honorable Samuel Conti, United States District Judge for the [illegible]

DUNIWAY, Circuit Judge:

These appeals arise from separate actions which Meier filed in two different districts against Suckling, an attorney who had done legal work in connection with Meier's sales of certain mining claims, from giving grand jury testimony and cooperating with a federal investigation of possible tax evasion and conspiracy charges against Meier. Both complaints, the first filed in the Central District of California, the second in the District of Nevada, alleged that Suckling had violated the attorney-client privilege by providing information and certain documents to federal agents, and that Meier's Fourth, Fifth, Sixth and Fourteenth Amendment rights would be violated if the documents and Suckling's testimony were presented to a grand jury. Named as defendants in each case were Suckling, the Attorney General of the United States, and the United States Attorney for the forum district. The prayers were for a temporary restraining order, a preliminary and a permanent injunction against Suckling, prohibiting him from appearing before any grand jury, suppressing all leads and evidence derived from his cooperation, and compelling immediate return to Meier of all documents belonging to him.

In the Central District of California Meier was partially successful. The district court granted relief similar to that sought, but declined to encompass anything that might be done in the District of Nevada in its decree, because the district court there had already issued an ex parte order requiring Suckling to testify. In the District of Nevada, the district court dismissed Meier's identical action. The Attorney General and the United States Attorney [the government attorneys] appeal from the California district court's decree [No. 74–1182]. Meier cross-appeals, urging that the court erred in excluding the District of Nevada from the scope of its decree [No. 74–1673]. He also appeals from the dismissal of his action in the District of Nevada [No. 74–1910]. Suckling has not appealed. We reverse and remand in No. 74–1182, and dismiss in Nos. 74–1673 and 74–1910.

I. *The Facts.*

[illegible] district courts, he was already the subject of a criminal prosecution in the District of Nevada. A grand jury for that District, on August 9, 1973, had returned a two count indictment charging him with evasion of federal income taxes for the calendar years 1968 and 1969. Later, at least partially on the basis of information provided by Suckling, the government decided to seek additional or superseding indictments. Suckling had described an elaborate scheme whereby Meier and others would cause nearly valueless mining claims to be sold through strawmen and dummy foreign corporations to Meier's employer, the Hughes Tool Company, for extravagantly inflated sums of money. Apparently the plan was that the proceeds, reaped by the tax exempt foreign corporations, were to be distributed ultimately to the participants in the scheme by cash payments and deposits in secret foreign bank accounts.

On November 20, 1973, the government applied *ex parte* to the district court for Nevada for an order compelling Suckling to testify before the grand jury. Accompanying the application was Suckling's affidavit describing his relationship with Meier and the nature of his testimony, and a government memorandum arguing that the attorney-client privilege did not apply because Meier had retained Suckling to assist him in criminal and fraudulent activities. The district judge agreed with the government's position and ordered Suckling to testify, which Suckling did later the same day.

On the next day, November 21, Wyshak, Meier's attorney, learned from Cotton, an attorney in the Tax Division of the Department of Justice, that the government planned to seek new indictments. During the conversation Wyshak inquired as to possible venue for the indictments. Cotton mentioned Utah, California, Nevada and possibly several oth-

er states, but told Wyshak that the Internal Revenue Service had recommended Nevada. There is no indication that Wyshak then knew that Suckling had already testified before a grand jury, but as early as November 29, he and Meier began to suspect that Suckling *would* testify. On that date Wyshak had Meier execute an affidavit reciting his retention of Suckling and his belief that Suckling would soon go before a grand jury. The affidavit was later filed with each of Meier's complaints.

In early December, Wyshak talked to Lusk, an Assistant United States Attorney in Nevada, and learned that the new or superseding indictments were to be returned in Nevada, probably on December 20. Without disclosing his plan to file suit in California, Wyshak sought to delay the new indictments until the second week of January. However, it was not until the district judge supervising the grand jury became ill that the government agreed to a delay.

On December 20, Meier's complaint and his November 29 affidavit were filed in the district court for the Central District of California. At the hearing on the request for a temporary restraining order, held the next day, the government objected that the Central District of California was not the appropriate forum pointing out that Meier had already been indicted in Nevada, that Suckling had already appeared before the grand jury there, and that there were no plans to indict Meier anywhere else. The government offered to call the United States Attorney as a witness to confirm that his office did not plan to prosecute Meier, but the district judge refused the offer. In addition, Wyshak, cross-examined by the government, was unable to specify any reason for his belief that Meier would be indicted in California other than Cotton's early conjecture about possible venue. Subsequent information should have made it plain to Wyshak, and to the district court, that this belief was wide of the mark. The district judge, however, apparently outraged that the Nevada district court had issued an order requiring Suckling to testify without notifying Meier, and wishing to ensure that a similar procedure was not followed in his own district, issued the temporary restraining order, but expressly excluded the District of Nevada from its operation.

Dissatisfied with this limited relief, Meier filed an identical complaint in the district court for Nevada on December 26. The same judge who had earlier ordered Suckling to testify rejected Meier's argument that the California order was binding on grounds of collateral estoppel and refused to grant a second temporary restraining order. Hearings on the requested preliminary injunction were put off.

On January 2, 4 and 9, 1974, the district court for the Central District of California held hearings on the request for a preliminary injunction. By this time the court had received under seal Suckling's affidavit and the other documents on which the district judge in Nevada had relied in ordering Suckling's grand jury appearance. But the court did not have before it either the transcript of Suckling's testimony or the documents claimed by Meier, both of which were subject to Meier's broad and unspecific claims of privilege, on which the court was about to rule. Despite the uncertainty about the character of the allegedly privileged material, the district judge made no attempt to obtain it for *in camera* review. Instead, and in spite of further government disclaimers of interest in a California prosecution, the judge, on January 9, 1974, issued an order, captioned a permanent injunction, which required the return of all the documents to Meier and enjoined the government attorneys

> from conducting any investigation or Grand Jury investigation and from initiating any criminal proceeding, in the Central District of California, or any other District except the District of Nevada, in which there will be used, directly or indirectly, any unlawful testimony or evidence containing privileged confidential

tween plaintiff and Suckling obtained from Suckling or any leads derived therefrom: provided, however, that [they] may, on at least 30 days' written notice delivered to plaintiff and his . . . counsel request relief by this Court from this Order for good cause shown.

Just five days after this order was entered, the grand jury for the District of Nevada returned two new indictments charging Meier and others with tax evasion and conspiracy. One count alleged tax evasion by Meier for the calendar year 1969, the same offense charge in Count II of the pending August, 1973, indictment, and thus operated as a superseding indictment. The district court for Nevada, noting the new indictments, dismissed Meier's action on January 30, 1974, without holding a hearing on the request for a preliminary injunction.

II. *The Suggestion of Dismissal.*

After the appeals before us were filed, Count III of new indictment No. LV 74–10, in the District of Nevada, was severed and transferred to the Central District of California at Meier's request. Counts I and II were retained for trial in the District of Nevada. It was agreed that the proceedings in Nevada on the second new indictment, No. LV 74–9, and the earlier August, 1973, indictment would be held in abeyance pending the outcome of the LV 74–10 cases.

On May 17, 1974, Meier filed a motion to suppress and for return of property in the Nevada LV 74–10 prosecution. The motion was based on the same grounds, and was directed at the same evidence and property, as are involved in these appeals. The trial judge denied the motion and this court later denied Meier's petition for writ of mandamus and/or prohibition. *Meier v. United States District Court, District of Nevada*, September 12, 1974, No. 74–2650. On October 17, 1974, Meier filed a petition for a writ of certiorari in the Supreme Court.

Meanwhile, the Nevada LV 74–10 case was set for trial on December 2, 1974. Meier failed to appear. The trial judge ordered his bail forfeited, issued a warrant for his arrest, and reset the case for January 3, 1975. Meier, who currently resides in British Columbia, again failed to appear. He also failed to appear for a hearing in the Central District of California case on January 27, 1975. There too he was declared a fugitive and a warrant for his arrest was issued.

In the meantime, the Supreme Court had denied the petition for certiorari with the notation "*See Molinaro v. New Jersey*, 396 U.S. 365 [90 S.Ct. 498, 24 L.Ed.2d 586] (1970)," 419 U.S. 1116, 95 S.Ct. 796, 42 L.Ed.2d 815 (1975). In *Molinaro* the Court dismissed a criminal appeal because the defendant was a fugitive. The complaints in the cases before us here are functionally, but perhaps not technically, the equivalents of motions to suppress evidence and for the return of property under Rules 41(e) and 41(f) of the Federal Rules of Criminal Procedure. They differ from such motions in only two respects: Suckling, neither a defendant nor a governmental employee, is named as a defendant, and the proceedings were arguably commenced in advance of indictment (assuming the dubious proposition, advanced by Meier, that his suits are unrelated to the August, 1973, indictment). While it is manifest that these cases are important only in relation to the pending criminal prosecutions, the jurisdictional basis for such preindictment motions, and their proper characterization as "civil" or "criminal" proceedings, have always been somewhat hazy. *See, e. g., Hoffritz v. United States*, 9 Cir., 1956, 240 F.2d 109, 112 & n. 8; *Rodgers v. United States*, S.D.Cal., 158 F.Supp. 670, 675–78, *petition for mandamus and/or prohibition denied*, 9 Cir., 1958, *id.* at 684 note. Thus, while it might be appropriate to dismiss Meier's appeals under the *Molinaro* rationale, we elect not to do so.

III. *The Appeals from the Central District of California.*

A. *Jurisdiction on Appeal.*

[1] To the extent that the proceedings below are regarded as civil in na-

ture, we have jurisdiction to hear the government attorneys' appeal in No. 74–1182 under 28 U.S.C. § 1291 or § 1292(a)(1). Meier concedes as much. He argues that if the proceedings are to be treated as part of a criminal prosecution, as the government attorneys urge, the Criminal Appeals Act, 18 U.S.C. § 3731 (Supp.1975), does not provide appellate jurisdiction. That section provides in pertinent part as follows:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Meier argues that this section does not apply because the appeal is not "by the United States," but by two individual government attorneys. Alternatively, he contends that the government attorneys' failure to file the required certificate within thirty days of the district court's decree is a fatal defect in the perfection of the appeal. Each of these arguments is without merit. We decline to permit Meier to foreclose the government's right to appeal simply by the manner in which he styles his pleadings. Meier's complaint was, in substance, against the government, as it would be under Rules 41(e) and (f).

[2] Other circuits have held that delayed filing of a § 3731 certificate does not destroy appellate jurisdiction. *See, e. g., United States v. Wolk*, 8 Cir., 1972, 466 F.2d 1143, 1146 n. 2; *United States v. Kleve*, 8 Cir., 1972, 465 F.2d 187, 189–90; *United States v. Welsch*, 10 Cir., 1971, 446 F.2d 220, 224. While such delay is not to be regarded with favor, we agree that it does not rise to jurisdictional dimensions.

We conclude that we have jurisdiction in No. 74–1182. We need not, for reasons that will appear, decide whether we also have jurisdiction in No. 74–1678.

B. *Jurisdiction of the District Court.*

The jurisdictional character of the proceeding below is somewhat muddled. Meier has acknowledged that his "complaint" is "in the nature of" a preindictment motion to suppress and for return of property. Pointing to the August, 1973, indictment, the government attorneys urge that the proceeding was in fact a pretrial motion under Rules 41(e) and 41(f), F.R.Crim.P.,[1] tied to the pending criminal prosecution in Nevada, and that therefore the district court for the Central District of California lacked subject matter jurisdiction. While this argument is in some respects appealing, we note several defects in it. First, only criminal defendants and the government are ordinarily parties to a Rule 41 motion. Suckling is neither. Second, while the 1972 amendments to Rule 41 provide

1. These Rules provide as follows:

> (e) *Motion for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.
>
> (f) *Motion to Suppress.* A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12.

that motions to suppress may be brought only in the district of trial, motions for the return of property may still be brought in the district of seizure.[2]

Meier argues that the district court's power over the case springs from a different jurisdictional [illegible], the so-called "anomalous jurisdiction," *see Lord v. Kelley*, D.Mass., 1963, 223 F.Supp. 684, 688–89, *appeal dismissed* 1 Cir., 1964, 334 F.2d 742. This has been variously explained as an inherent "supervisory" or "disciplinary" power over officers of the court, *see, e. g., Centracchio v. Garrity*, 1 Cir., 1952, 198 F.2d 382, 385–86; *United States v. Maresca*, S.D.N.Y., 1920, 266 F. 713, 717, or as the power of a court "[to] reach forward to control the improper preparation of evidence which is to be used in a case coming before it, and . . . by summary procedure [to] restrain oppressive or unlawful conduct of its own officers," *Foley v. United States*, 5 Cir., 1933, 64 F.2d 1, 3; *In re Fried*, 2 Cir., 1947, 161 F.2d 453, 458; *Smith v. Katzenbach*, 1965, 122 U.S.App.D.C. 113, 351 F.2d 810, 815–16. While this power is not stated in any jurisdictional statute, it has long been recognized as a basis for independent, preindictment suits in equity seeking the suppression and return of illegally obtained evidence. *See Hunsucker v. Phinney*, 5 Cir., 1974, 497 F.2d 29, 31–35, and cases there collected.

[3] Thus there is a theoretical basis for the district court's assumption of jurisdiction, but the anomalous jurisdiction is equitable in nature, and "it does not automatically follow that this unique power should be exercised whenever it exists." *Hunsucker v. Phinney, supra*, 497 F.2d at 34. Rather, it is to be exercised, if at all, with caution and restraint and in accordance with familiar limitations on the granting of equitable relief. *Id.* at 34; *Smith v. Katzenbach, supra; Centracchio v. Garrity, supra; Donlon v. United States*, D.Del., 1971, 331 F.Supp. 979; *Fifth Avenue Peace Parade Committee v. Hoover*, S.D.N.Y., 1971, 327 F.Supp. 238, 242; *Lord v. Kelley, supra; Rodgers v. United States, supra;* 3 C. Wright, *Federal Practice and Procedure, Criminal*, § 673 (1969). Rule 41 is but "a crystallization of [this] principle of equity," *Hunsucker v. Phinney, supra*, 497 F.2d at 34; *Smith v. Katzenbach, supra*, 351 F.2d at 814, and thus subject to the same equitable limitations.

As will be shown, we think that regardless of the jurisdictional premise of the proceeding in the trial court, equitable considerations required that court to dismiss Meier's action. Thus, we do not reach the theoretical question of the district court's subject matter jurisdiction, and do not consider to what extent, if any, Rule 41 operates as a restriction on the forum in which the principle of anomalous jurisdiction is applicable.

C. *Equitable Jurisdiction.*

[4] "The facts of this case," as the government brief aptly puts it, "clearly demonstrate the improper use of a civil action filed in one district to hamper an ongoing criminal tax evasion proceeding in another district." At the time Meier's complaint was filed, he had already been indicted in the District of Nevada, he knew that he was about to be indicted again in that district, and he had no sound reason to suspect that superseding indictments, or any indictments, would be returned elsewhere. At the temporary restraining order hearing, both Meier and the district judge were advised that Suckling had already, with the blessing of the Nevada district court, given the testimony sought to be suppressed. During the proceedings at least three government attorneys, including the Assistant Attorney General, Tax Division, went on record denying that there was a plan to prosecute in a California district court.

2. We note in this connection, however, that Meier's complaint does not allege where the "seizure" of his documents from Suckling took place.

Under the circumstances, Meier's remedy was in the District of Nevada, and he failed to show that he would be irreparably injured if the equitable relief prayed for were not granted by the district court in California. *See Hunsucker v. Phinney, supra*, 497 F.2d at 34; *Rodgers v. United States, supra*, 158 F.Supp. at 679–83. The bulk of the evidence sought to be suppressed had already gone to the grand jury, which was entitled to consider it even if it had been illegally obtained. *United States v. Calandra*, 1974, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561. To the extent that Meier's purpose was the suppression of the material at trial, or obtaining its return, he could have obtained a prompt adjudication of his claims by filing a Rule 41 motion in the criminal prosecution already pending in Nevada or, granting *arguendo* the doubtful proposition that the superseding indictments were unrelated to the indictment already returned, by filing a preindictment motion in Nevada. The Nevada district court was already familiar with the case, had jurisdiction over both prosecutions, and had already ruled, albeit *ex parte*, on the claims Meier was pressing. Unlike the California district court, it had ready access to a transcript of the allegedly privileged testimony.

Instead, Meier chose to file his action in another district. His reasons for doing so are all too evident: at best, he hoped for a forum more sympathetic to his position, at worst, he hoped to delay the Nevada prosecutions and to gain broader discovery than that normally available in a criminal proceeding. None of these objectives was worthy of the equitable sanction of the California district court.

Smith v. Katzenbach, supra, was another case in which a prospective criminal defendant attempted to shop for a forum by filing, under the guise of a civil action, in a district other than those specified in Rule 41, what was essentially a pre-trial motion. In upholding the district court's dismissal of the action for want of equity, the court observed as follows:

> To gain the perspective needful for this case we stretch our canvas beyond the traditional rubric of adequacy of remedy at law. A court properly exercises its discretionary powers by withholding relief that may involve interjection into criminal proceedings in another forum, particularly where it adheres to a policy indicated by Congress, as here in [former] Rule 41(e) [now Rules 41(e) and 41(f)], of the course of ultimate determination of questions involved in such proceedings. See Douglas v. City of Jeannette, 319 U.S. 157, 162–163, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).
>
> *Id.*, 351 F.2d at 816.

The soundness of this principle is apparent in the present case. But for Meier's flight, the conflicting adjudications and the appeals which resulted from his successful attempt to invoke the jurisdiction of an inappropriate forum might have delayed the commencement of two criminal trials, in contravention of the strong policy favoring speedy justice.

In addition, the "permanent injunction" issued by the California district court prohibited, by its terms,

> any investigation . . . in the Central District of California, or any other District except the District of Nevada, in which there will be used, directly or indirectly, any unlawful testimony or evidence containing privileged confidential communications between plaintiff and Suckling obtained from Suckling *or any leads derived therefrom*

unless cleared by the district court after 30 days written notice to it and to Meier. This kind of order had a high potential for interfering with entirely proper investigation incident to the two prosecutions already pending in the District of Nevada. Suckling lives and practices law in the Central District of California and Meier lived and had business deal-

by the court's order during the years for which his tax liability was being looked into. Certainly it is an unprecedented anomaly for a court in one district to attempt to control a criminal prosecution in another district by requiring the government to give thirty days notice to the prospective defendant of its every investigatory move and then to obtain the court's approval before proceeding.

In our view, the California district court, in the proper exercise of its equitable discretion, should have squelched Meier's attempt to circumvent the Nevada district court's jurisdiction by declining to exercise its own jurisdiction, if any, and dismissing the action.

In view of our holding that the district court should have declined jurisdiction, we need not reach Meier's cross-appeal. Dismissal of the action will render Meier's appeal moot.

IV. *The Appeal from the District of Nevada.*

[5, 6] The denial of a preindictment motion or comparable relief is an interlocutory, nonappealable order unless "the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *Di-Bella v. United States*, 1962, 369 U.S. 121, 131–32, 82 S.Ct. 654, 660, 7 L.Ed.2d 614. Meier's appeal meets neither criterion for appealability. His complaint sought suppression as well as return. And even if the August, 1973, indictment is viewed as independent of the superseding indictment, there was already a criminal prosecution *in esse* because presentment had already been made to the Nevada grand jury at the time the complaint was filed. *Id.*, 369 U.S. at 131, 82 S.Ct. 654. Thus, the appeal should be dismissed for want of jurisdiction in this court.

In No. 74–1182, the judgment appealed from is vacated and the case is remanded to the district court with directions to dismiss the action.

In No. 74–1673, the appeal is dismissed.

In No. 74–1910, the appeal is dismissed.

Fred Andrew JOHNSON, Appellant,

v.

Lou V. BREWER, Warden, Fort Madison Penitentiary, Appellee.

No. 74–1944.

United States Court of Appeals, Eighth Circuit.

Submitted March 12, 1975.

Decided Aug. 8, 1975.

Rehearing and Rehearing En Banc Denied Sept. 24, 1975.

State prisoner, who had been convicted of possession of heroin with intent to deliver, filed a petition for writ of habeas corpus. The United States District Court for the Northern District of Iowa, Edward J. McManus, Chief Judge, denied relief and petitioner appealed. The Court of Appeals, Talbot Smith, Senior District Judge, held that where, in a previous drug case, the prosecutor had confessed in open court that a government informant had deliberately lied when he testified that he purchased drugs from the defendant, this same informant used an identical modus operandi to become key government witness in the prosecution of the petitioner, the informant was a career informant depending on a continued relationship with the government, and several different forms of bias might exist and might exist simultaneously, the state had an obligation to permit an inquiry at trial into the informant's initial deliberate lie, and the

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
OCT 1 1975
EARL E. MELEN, JR., CLERK
CLERK OF APPEALS

Docketed
OCT - 6 1975

JOHN H. MEIER,

Plaintiff-Appellee,

vs.

No. 74-1182

WILLIAM KELLER, ROBERT BORK,

Defendants-Appellants.

JOHN H. MEIER,

Plaintiff-Appellant,

vs.

No. 74-1673

WILLIAM KELLER, ROBERT BORK, and JOHN SUCKLING,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California

JOHN H. MEIER,

Plaintiff-Appellant,

vs.

No. 74-1910

O R D E R

DeVOE HEATON, ROBERT BORK, and JOHN SUCKLING,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Nevada

Before: DUNIWAY and HUFSTEDLER, Circuit Judges, and CONTI,* District Judge

The slip opinion filed on June 27, 1975 in these cases is modified in the following respects:

*The Honorable Samuel Conti, United States District Judge for the Northern District of California, sitting by designation.

1. At page 3, the next to the last line,of the slip opinion, the words "met with" are stricken and the words "talked to" are inserted in their place.

2. At page 4 of the slip opinion, the first full paragraph, the fifth line, the words "the court lacked subject matter jurisdiction" are stricken and the following words are inserted in their place: "the Central District of California was not the appropriate forum."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN H. MEIER,

Plaintiff-Appellant,

v.

DE VOE HEATON, ROBERT BORK, and JOHN SUCKLING,

Defendants-Appellees.

No. 74-1910

DC# LV 2167

APPEAL from the United States District Court for the

District of NEVADA (Las Vegas)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of NEVADA

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is DISMISSED.

With costs in this court in favor of the Appellees and against the Appellant in the amount of $80.75

Cost of printing Appellees' brief $80.75

6/25/75

Filed and entered June 27, 1975

APPENDIX C

JUDGMENT

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN H. MEIER,

Plaintiff-Appellee,
Cross-Appellant,

v.

WILLIAM KELLER, ROBERT BORK, etc., et al.,

Defendants-Appellants,
Cross-Appellees.

No. 74-1182
74-1673

APPEAL from the United States District Court for the CENTRAL
District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the CENTRAL District of CALIFORNIA

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Vacated and remanded with directions in 74-1182, and dismissed in 74-1673.

With costs in this court in favor of the Federal Appellants-Cross-Appellees, in the amount of $86.00
Printing of brief $86.00

A True Copy
Attest: 11/21/74

[illegible], Clerk
By [illegible] Deputy

Filed and entered June 27, 1975

APPENDIX D